BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RUSSELL FRANKLIN BRAZELL Claimant VS. **FURMANITE AMERICA, INC.** Respondent AND **NEW HAMPSHIRE INSURANCE CO.** Insurance Carrier	)	Docket No. **1,053,760**

ORDER

Claimant requests review of the April 26, 2013, Award by Administrative Law Judge (ALJ) Rebecca A. Sanders. The Board heard oral argument on August 13, 2013.

APPEARANCES

Roger A. Riedmiller of Wichita, Kansas, appeared for claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties stipulated that claimant had a 100% wage loss from November 1, 2010, through April 30, 2012. Further, respondent stipulated that claimant sustained a personal injury by accident arising out of and in the course of his employment, but disputes claimant sustained a permanent disability. Claimant stipulated the evidence in the record indicates that he sustained no permanent functional impairment.

ISSUES

The ALJ found claimant sustained an accidental injury arising out of and in the course of employment. The ALJ further found claimant did not sustain any permanent functional impairment but ordered respondent to pay for the outstanding medical bills.

Claimant requests review of the nature and extent of his disability, if any. Claimant argues that he is entitled to a 50% work disability beginning November 20, 2010, and until April 30, 2012, based upon Dr. Barkman's restrictions. As of May 1, 2012, claimant would be entitled to a 36.5% work disability. At oral argument, claimant argued that he sustained a single task loss of not being able to ride in a vehicle with an air freshener, but acknowledged he could not prove the percentage of task loss in accordance with K.S.A. 44-510e.

Respondent asks the Board to affirm the ALJ's findings.

The issues are:

1. What is the nature and extent of claimant's disability?

2. What was claimant's average weekly wage at the time of the accident?

FINDINGS OF FACT

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was hired initially as an assistant tech on November 16, 2009, and then later promoted to a supervisor/lead tech. Claimant's job required him to travel from El Dorado, Kansas, to and from job sites.

In March 2010, claimant's supervisor, Wayne Watts, began putting air fresheners in respondent's truck that he drove. Claimant testified that when he rode in Mr. Watts' truck with the air fresheners, claimant's chest hurt, his eyes watered, his nose burned and he had difficulty breathing. Claimant complained to Mr. Watts, about the air fresheners causing him breathing problems in the spring of 2010. Mr. Watts indicated claimant would have to live with the air fresheners. Initially, Mr. Watts hung a blue pine tree air freshener from the mirror and placed a stick air freshener in each vent. Eventually, they worked out a compromise where the stick air fresheners were removed and only the blue pine tree air freshener remained. Claimant had to continually ride with Mr. Watts throughout the spring and summer of 2010. These trips could take anywhere from 2-18 hours of truck driving. Claimant testified that after finding out that the air fresheners were bothering claimant, Mr. Watts replaced the air fresheners more frequently.

Claimant introduced as an exhibit, a package of three blue pine tree air fresheners at the regular hearing. The directions on the air freshener package instruct that after the package was opened, over a seven-week period, the air freshener should be pulled a little

further from the package each week, until the entire air freshener is exposed. Claimant testified Mr. Watts did not follow the directions and pulled the entire air freshener from the package.

In the fall of 2010 for a month to a month and one-half, claimant rode with another tech in a truck they used that did not have an air freshener. During that time period, claimant's breathing improved.

On October 31, 2010, claimant was riding with Mr. Watts to a job site in St. Marys, Kansas. Claimant testified, ". . . I could tell there was more than just one of those [air fresheners] open. I mean, he had one [air freshener] hanging in the window, but it was so strong in that truck, it just immediately started irritating my throat, my nose, my eyes. I got nauseous. My chest was hurting."[1] Claimant put his head out the truck window for the entire two hours it took to get to the hotel in Topeka.

After claimant got to his hotel room, he took a long hot shower because of having watery eyes, a burning sensation in his eyes and nose as well as difficulty breathing. The next morning, on November 1, 2010, claimant was feeling a little bit better, but he still had chest pains. After getting into the truck, claimant's chest began hurting, he was nauseous, and his eyes and nose were burning. In order to make the trip from Topeka to St. Marys, Kansas, which was approximately 45 minutes, claimant rolled the truck windows down. Claimant was able to work the entire day at Jeffrey Energy Center near St. Marys and had no difficulty performing his job duties. On the return trip that evening to El Dorado, claimant had more chest pains and burning in his throat, nose and eyes. Claimant testified that he made repeated comments the whole trip that there was too much air freshener in the truck. November 1, 2010, was the last time claimant was exposed to the air freshener.

Around 11:30 p.m. on November 1, 2010, claimant woke up due to lack of breath so he sought treatment at the Kansas Medical Center in Andover, Kansas, in the early morning hours of November 2. Medical treatment was provided as if claimant was having a heart attack and he remained in the hospital for three days. When claimant left the hospital after being released, he did not have any symptoms with regard to his eyes, nose, lungs and throat, but he still had high blood pressure. However, claimant was diagnosed with high blood pressure in 2006. Since being released from the hospital, claimant has not had a recurrence of his symptoms.

Claimant followed up with his primary care physician, Dr. Steven Lemmons, who wrote a letter for claimant to take to work indicating claimant should not be exposed to air

[1] R.H. Trans. at 19.

fresheners. Claimant took the letter to respondent after being discharged from the hospital on November 3, and was laid off.

Prior to April 2010, claimant never had similar symptoms when exposed to air fresheners and even had used air fresheners in his personal vehicles. Nor did claimant have symptoms when exposed to air fresheners sprayed from a can. Claimant also testified he had no problems when he was exposed to Lysol, Pine-Sol, laundry detergent, perfume or cologne. Claimant indicated that he did not have any previous problems with the chemicals inside the various plants where he had worked. Claimant testified that he had a history of being allergic to tree and grass pollens as well as some pain medication.

Dr. Harold Barkman Jr., a specialist in pulmonary medicine, was authorized by respondent to treat claimant and examined him on June 23, 2011. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Dr. Barkman's report indicated that in October 2010, claimant, while riding in a car with his supervisor, was exposed to multiple air fresheners that were entirely opened. Dr. Barkman ordered a pulmonary function test, a chest x-ray and a blood panel. The results of the pulmonary function test and chest x-ray were normal. The lab work showed that claimant's immunoglobulin E (IGE) level was elevated due to an allergic background. Dr. Barkman opined, "I thought that his -- he had multiple symptoms and they were historically associated with irritant levels of exposure to the car fresheners that he had, that he was exposed to, as he traveled to and from the job."[2] Dr. Barkman further opined that claimant's exposure to the air freshener was the trigger that led him to the emergency room.

Dr. Barkman agreed that claimant's medical treatment rendered was reasonable for his symptoms that he developed while riding in the truck with an air freshener. The doctor acknowledged that generally it is necessary to know the chemical composition, the quality of the chemical composition and the quantity in order to prove whether someone is allergic to the product. Dr. Barkman testified:

> Q. So there's nothing that indicates the chemical composition, the quality of the chemical composition, the quantity of the chemicals in it, or any of that, correct?
>
> A. As I understand it, yes.
>
> Q. Generally, isn't that type of information necessary in order to prove whether somebody is allergic to a product?

[2] Barkman Depo. at 10.

> A. Yes. In fact, as part of his workup they tried to get this information so they could test him specifically and couldn't because they wouldn't reveal what they are, and so in my report I talk about irritant more than allergy because in reality there's no medical testing, because we do not know the actual compounds that are in the freshener.
>
> Q. Well, if we don't know the actual compounds of the freshener, then are you able to state within a reasonable degree of medical probability that his exposure to this air freshener caused the symptoms that he complained of?
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> A. No, I believe we can. I mean, again, it's inhalation of these vapors or compounds. We may not know what's in here (indicating), but a parallel would be perfumes bother certain people and we don't know what's in the perfumes. All we can do is test people to see what the effect is. . . .[3]

Based upon the AMA *Guides*[4], Dr. Barkman opined that claimant did not have any permanent impairment regarding his exposure to the air freshener. Dr. Barkman testified:

> Q. And is that opinion with respect to restriction and limitation a permanent restriction or limitation, or temporary?
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> A. I guess I'd make it permanent.
>
> Q. What is it that's causing you to struggle to answer it in that fashion?
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> A. Well, again, from what we understand of the history, there were -- what do you say -- there were multiple air fresheners, not just one, and there was one specific one that seemed to be the most likely trigger. I mean, given these compounds and the use in the right way, I mean, could he be exposed to them? Well, maybe. I mean, I was thinking more in terms of the level of exposure that he was exposed to. I mean, maybe he could get in the car with a different type of air freshener and it wouldn't bother him. I mean, I didn't go beyond the scope of the specific one that he was exposed to.
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> And, again, I was thinking I'd make it permanent to the level of the multiple air fresheners over a period of time in riding to work. Does that mean he can never be exposed to an air freshener? I really can't address that without further information on the type of air freshener and how it's handled. That's what I'm trying to say.

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[3] *Id.* at 24-25.

[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

> Q. Would you recommend that Mr. Brazell avoid air fresheners, concentrated air fresheners, in the future?
>
> A. Yes.[5]

On cross-examination, Dr. Barkman testified that claimant could be around one of the air fresheners he was exposed to on October 31, 2010, so long as he was exposed to one air freshener that was used according to the product directions. On redirect examination, the doctor testified, "Well, I would prefer that he avoid them [car air fresheners] altogether, but, again, there are different types. I just -- would have him avoid them altogether."[6]

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[7] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[8] It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability.[9]

Respondent asserts that in order for claimant to be entitled to a work disability, he must have a permanent functional impairment. Respondent cites *Blaskowski,*[10] wherein the Kansas Court of Appeals stated:

> Blaskowski submits that the statute does not require a functional impairment in order to obtain a work-disability award based on 100% wage loss. Taking this interpretation to the extreme, if an employee trips and suffers a sprained ankle at

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[5] *Id.* at 14-15.

[6] *Id.* at 33.

[7] K.S.A. 2010 Supp. 44-501(a).

[8] K.S.A. 2010 Supp. 44-508(g).

[9] *Tovar v. IBP, Inc.,* 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[10] *Blaskowski v. Cheney Door Co.,* No. 106,899 (Kansas Court of Appeals unpublished opinion filed Oct. 5, 2012, *Pet. for Review* pending). Because a Petition for Review is pending, the Board does not consider *Blaskowski* a legal precedent.

> work then eventually quits without obtaining subsequent employment, the employee is entitled to permanent partial disability merely because the employee had a work-related accident and 100% wage loss. This is an illogical interpretation and does not stand up to the language of the statute.
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> "When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be." *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009). We find that under the clear language of K.S.A. 44-510e(a) any use of the formula found in K.S.A. 44-510e(a) presupposes that the "employee is disabled in a manner which is partial in character and permanent in quality." This requires a threshold finding of a permanent impairment or disability before applying the formula for work disability. See *Abdi,* 2011 WL 3444330, at *4; *Hart v. Bott Family Farms*, No. 99,895, 2009 WL 1140274, at *5, (Kan. App. 2009) (unpublished opinion), *rev. denied* 290 Kan. 1093 (2010).
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> As previously noted, Blaskowski does not challenge the Board's factual findings. The Board found that Blaskowski failed to prove he suffered a permanent injury from the work accident and, thus, regardless of Blaskowski's 100% wage loss, he is not entitled to a work-disability award.

The Board takes note of *Hart*[11], which was decided prior to *Blaskowski.* In *Hart,* the Kansas Court of Appeals stated:

> In this case, we have a specific finding by the Board, supported by substantial competent evidence, that the claimant suffered *no* permanent impairment. We agree with Bott that the language of K.S.A. 44-510e(a) necessarily precludes a finding that claimant is entitled to work disability under this circumstance.

In *Hillegeist,*[12] the Board held:

> The Board finds claimant has failed to prove that she suffered permanent injury as the result of the accident on December 11, 2009. This record supports a finding that claimant suffered an accident on that date, but any resulting permanent injuries are not supported by this medical record. The Board agrees with the ALJ's finding that claimant appeared less than forthright in her presentation. The Board finds claimant has not satisfied her burden of proving that she suffered permanent impairment from this accident.

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[11] *Hart v. Bott Family Farms,* No. 99,895 (Kansas Court of Appeals unpublished opinion filed Apr. 24, 2009 *rev. denied* (2010).

[12] *Hillegeist v. Ellsworth Correctional Facility,* No. 1,052,334, 2013 WL 1876340 (Kan. WCAB Apr. 26, 2013).

K.S.A. 44-510e states in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

Based upon *Hart* and *Hillegeist,* the Board finds that claimant is not entitled to permanent partial disability benefits based upon a work disability. Claimant admits that no medical expert opined claimant had a permanent functional impairment. Claimant argues that based upon Dr. Barkman's restrictions, claimant sustained a task loss of not being able to drive in a vehicle with an air freshener. The Board finds that argument unpersuasive, as Dr. Barkman was somewhat equivocal. The doctor first testified the only thing he could be sure of is that claimant should not be in a motor vehicle that had multiple air fresheners of the type that caused claimant's symptoms. That was because the only thing Dr. Barkman could be sure of was that claimant became symptomatic when exposed to multiple blue pine tree air fresheners. The doctor did not know the chemicals in the air freshener that caused claimant's symptoms, nor the quality or quantity of the chemicals. Later, Dr. Barkman indicated he would have claimant avoid all car air fresheners. Simply put, the Board finds the single, limited restriction imposed by Dr. Barkman is insufficient evidence to prove that claimant sustained a task loss. Under Dr. Barkman's restriction, claimant could continue to operate or ride in a motor vehicle.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[13] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

CONCLUSION

1. Claimant sustained no permanent functional impairment and is not entitled to permanent partial disability benefits based upon a work disability.

2. The issue of claimant's average weekly wage is moot.

[13] K.S.A. 2010 Supp. 44-555c(k).

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated April 26, 2013, is affirmed.

IT IS SO ORDERED.

Dated this 29th day of August, 2013.

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BOARD MEMBER

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BOARD MEMBER

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